

ESA BIN SA'YON

v.

WOON KIM POH & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU

MAHADEV SHANKAR J

[CIVIL SUIT NO. 546 OF 1984]

18 JUNE 1985

CIVIL PROCEDURE: *Injunction - Ex parte - Non-disclosure of material facts - Effect - Dissolution of injunction - A matter of judicial discretion - Effect of dissolution on grounds of concealment of facts.*

LEGAL PROFESSION: *Officer of Court - When conduct impugned - Full inquiry into charges imperative.*

The 1st defendant applied to set aside an *ex parte* injunction order granted to the plaintiff. The only ground for the application is non-disclosure of material facts by the plaintiff. The 1st defendant asserted in his affidavit that the plaintiff has misled the Court since various facts had not been contained in the plaintiff's affidavit. The plaintiff contended that these facts were not material to the application for injunction. The Judge then enunciated the legal principles as to the dissolution of an injunction for the non-disclosure of facts.

Held:

[1] There is no inflexible rule that every time there is a non-disclosure of the entire history of a dispute, it must follow as a matter of course that the injunction obtained should be set aside.

[2] The granting and the dissolution of injunction rests upon the exercise of judicial discretion. Suppression and/or concealment are pejorative words, which import a culpable intent to mislead the Court.

[3] Where an *ex parte* injunction is dissolved on the ground of concealment of facts, the plaintiff is not prevented from making another application on merits.

[4] It is a rule of evidence that when contentious allegations are made in the affidavit of one party which is not denied in the affidavit of the other, then it must be implied that those allegations are admitted if it is reasonable in the circumstances to hold that such accusations should be traversed.

[5] Where the conduct of an Advocate and Solicitor is impugned in the manner as was done in this case it is imperative in the interests of the administration of justice that there be a full inquiry into the charges made and the issues of liability arising therefrom.

[1st defendant's application dismissed with costs.]

Cases referred to:

M.R.K. Nayyar v. Ponnusamy & Ors. [1982] 2 MLJ 174

Fitch v. Rochfort [1849] 80 LJ Ch 458

For the 1st defendant/applicant - P.K. Nathan (R. Muthu with him); M/s Nathan & Yang and M/s. Muthu & Co.

For the 2nd Defendant - Subra Naicker; M/s Subra Naicker & Co.

For the plaintiff/respondent - K.S. Dass; M/s Wong & Dass

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JUDGMENT

Mahadev Shankar J:

b Woon Kim Poh is an Advocate and Solicitor. He is an officer of this Court. He is also the 1st defendant. I am concerned with an application by him to set aside an *ex parte* injunction which I gave on 9 September 1984 at the instance of the plaintiff. The only case which his Counsel has cited in support of the application to dissolve the injunction is *M.R.K. Nayyar v. Ponnusamy & Ors.* [1982] 2 MLJ p. 174. It is submitted that because there has been non-disclosure of material facts, the *ex parte* injunction must be set aside.

But is it an inflexible rule that every time there has been non-disclosure of some facts, it automatically follows that an injunction must be set aside? I do not think so.

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Esa bin Sa'yon (Esa) filed this writ on 6 September 1984 and on the basis of urgency also filed at the same time a Summons in Chambers applying for an Order that his *status quo* in respect of the land comprised in EMR 831 for Lot 2111 in the Mukim of Pontian, District of Johor Bahru (the land), should be preserved pending the disposal of this action. The aforesaid land is hereafter referred to as the land.

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There is no need to set out here all the facts averred in his statement of claim and in the affidavit in support of the application. Suffice it to say that Esa said that he was the sole proprietor of the land. On 22 January 1979 he entered into an agreement with Madai Enterprise Sdn. Bhd. (Madai) whereby the latter was to develop the land into a housing estate. One of the terms of the arrangement was that Esa would transfer the land to Madai and/or its nominees who would hold it in trust for Esa until the completion of the housing estate or the agreement is determined by effluxion of time. A down payment of RM30,000 to be made by Madai upon execution of the Memorandum of Transfer did not materialise. The project was to be completed in 5 years and this did not happen either. In those circumstances, time being the essence of the contract, the agreement provided that it should automatically determine and the land be transferred to Esa.

*e**f*

Esa continued to remain in possession of the land all along but some time after the land had been transferred into the name of Madai, it is alleged that in breach of the joint venture agreement and without Esa's knowledge, Madai transferred land to Woon Kim Poh (Woon). First Esa claimed that Woon is not a *bona fide* purchaser but obtained this transfer by fraud and deceit. Esa says that Woon took the land with full notice of Esa's beneficial interest therein. Thus he claimed that Woon is only a trustee of the land for him. The injunction was required to preserve the subject matter of the action pending the disposal of the claims he had made in the writ for a declaration that Woon held the land as Esa's trustee, for an Order of Retransfer, and for a setting aside of the transfer from Madai to Woon and other consequential reliefs.

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The injunction was served on Woon and after entering an appearance on 18 September 1984, Woon applied to set aside the injunction. He claimed that in obtaining the injunction Esa had not brought several facts to the attention of the Court.

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Woon's method of presentation of these facts was to annex the cause papers of previous proceedings between him on the one hand and Esa, Madai, and another Company called Kembangan Trading & Credit Sdn. Bhd. (Kembangan) as exhibits to his affidavit.

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From these documents it is manifestly clear that the dispute between the parties had a very chequered history. From what I have been able to gather, the salient features would appear to be as follows.

After Esa transferred his land to Madai, he was made a director of that company. Madai then became the registered owner of the land and another lot comprised in the document of title GN 298 for Lot 3804 also in Pontian (the second lot).

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At that time Kembangan owned the land comprised in EMR 1566 for Lot 1690 also in Pontian (Kembangan's land).

Some time prior to 4 May 1981, Woon contends that Kembangan and Madai both orally agreed to sell their respective lands aforesaid to him. The price of Kembangan's land was RM250,000. The price for the land and the second lot now registered in Madai's name was RM550,000.

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On 4 May 1981, Woon says that Kembangan passed a resolution duly executed by all the Directors that their land be sold to him and it said that the resolution acknowledged full payment of the sum of RM250,000. Consequent to this sale Kembangan is said to have given Woon a letter of consent acknowledging him as the purchaser and authorising him to lodge a caveat over Kembangan's land which he did. On 1 July 1981 Kembangan executed a memorandum of transfer and handed the same over to Woon together with the document of title for Kembangan's land but when he presented the documents for registration on 24 September 1981 he was prevented from registering the transfer because Kembangan had on 15 August 1981 lodged a private caveat against Kembangan's land.

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Also on 4 May 1981 a document was signed purporting to be a resolution of Madai by 5 of its directors one of whom was Esa. This document authorised the sale of the land and the second lot to Woon for RM550,000. Woon says that the resolution acknowledged full payment of the aforesaid sum. He was given a letter of consent acknowledging him to be the purchaser and on 1 July 1981 Madai executed a memorandum of transfer in his favour and delivered the same to him together with document of title for registration. After stamping he presented these documents for registration on 24 September 1981 but here also he was blocked by a caveat which had been filed by Madai on 21 July 1981. On 12 December 1981, Esa also lodged a caveat but only against the land of which he had been the sole proprietor as aforesaid. The ground for this caveat was that Madai was trustee of the land for Esa. Notice of this caveat was given to Woon.

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On 15 January 1982 Woon filed Originating Motion No. 1 of 1982 in the High Court against Kembangan. He filed Originating Motion No. 2 of 1982 against Madai and Esa. In both he asked for an Order that the caveats filed against all the lands aforesaid be cancelled and for consequential relief on the ground that he was the lawful and beneficial owner of all these land to the full knowledge of Kembangan, Madai and Esa, and had paid the full consideration.

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On 17 April 1982 Esa filed an affidavit in OM2 of 1982. Here he asserted that Madai was only to hold the land in trust for him until their obligations as his joint-venture partner were fulfilled, and that it was represented to him that the circular resolution of Madai which he signed on 4 May 1981 was only a document to obtain finance and that he had never at any material time intended that the land should be beneficially transferred to Woon. He also said in the affidavit that he had instructed his solicitors to file a writ against Madai and Woon to have the land retransferred into his name.

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This writ was filed in the Johore Bahru High Court on 24 April 1982 under Suit No. 136 of 1982. Esa is the plaintiff and Madai and Woon are the defendants. In the statement of claim, Esa refers to the joint-venture agreement, the non-payment of the RM30,000 by Madai, the misrepresentation of the true nature of the resolution which he signed on 4 May 1981, the trust upon which Madai held the land for him and the breach of that trust committed by

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- a* Madai in selling and transferring the land together with the second lot to Woon for RM550,000 and the fraud perpetrated upon him in bringing about this state of affairs. The reliefs claimed are for a declaration of the trust, the cancellation of the transfer to Woon, and a retransfer of the land to Esa.
- b* The same day, that is 24 April 1982, Woon's Originating Motion against Kembangan came up before the late Dato Mohd. Yusof bin Abdul Rashid J in Open Court. It was ordered that OM1 of 1982 be consolidated with O.M.No. 2 of 1982 and to proceed as one action. It was further ordered that Kembangan and Madai undertake to pay Woon the sum of RM800,000 before 30 September 1982 and that upon receipt of that payment Woon do deliver the titles to all the aforesaid lands together with withdrawals of the caveats which Woon had filed against them. But if there was a failure to make the payments, then the caveats were to be removed by the Collector and the land transferred into Woon's name. This Order is clearly open to the reading that Mr. W.D. Moses appeared as Counsel only for Kembangan and Madai. Esa's interests does not appear to have been specifically mentioned in the order.
- c* On 16 June 1982, Esa filed a notice of discontinuance of his Civil Suit 136 of 1982. It is to be noted that in this action he was represented by M/s Nijar and Nijar.
- d* On 19 June 1982 an Order was made by the late Judge aforesaid. Esa's Counsel was present and the purport of the Order was to direct the Collector to cancel Esa's caveat dated 10 December 1981 against the said land and it would seem that this was done.
- But on 28 January 1984, Esa filed a further caveat against the said land. Woon caused the standard notice of removal to be issued and as no action was taken within a month thereafter this second caveat was cancelled.
- e* As none of these facts had specifically been brought to the notice of the Court in the affidavit filed in support of the application for the *ex parte* injunction, Woon asserted in his affidavit that he verily believed that Esa had misled this Court and that the *ex parte* injunction should be set aside.
- f* To this, Esa filed an affidavit in reply which he deposed to on 25 October 1984. He claims therein that he did not disclose these facts because he did not consider them material to his application for the *ex parte* injunction. He avers that his intention in the present action is to preserve the *status quo* and not to seek the removal of any caveat which was what the subject matter of the previous applications was all about. He claimed that when Madai entered into its settlement with Woon he was assured that he would not lose his property in any event and he therefore did not go into the details of the settlement reached between Madai and Woon. He then referred to Civil Suit No. 605 of 1984 filed in this Court on 4 October 1984 by M/s Subra Naicker & Co. Woon is the sole defendant in this action. In it Madai and Kembangan alleged that Woon was brought into the picture by the landowner to provide financial assistance and that he agreed to do on terms that the title deeds and blank transfers to all the aforesaid lands were only to be held by Woon as security and in escrow pending repayment. All the lands aforesaid were to be developed simultaneously as one scheme.
- g* But difficulties arose between the parties in 1981 and caveats were filed. Complex arrangements were entered into between the parties to resolve their disputes on or about 24 April 1982 and it is specifically averred that the Order made on that day was merely a "face-saving" consent judgment which Woon explained was necessary to avoid the embarrassment which would otherwise be caused to him as a Solicitor.
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- i* Part of the arrangement was that Woon was not to deal with any of the land in any manner prejudicial to the interests of Kembangan, Madai, and other interested parties.

But, say Madai and Kembangan in their statement of claim Woon did not honour his obligations and would not account for or issue receipts for sums given to him to reduce the debts and in June 1983 without the knowledge of Kembangan, and Madai and in breach of agreement and trust, fraudulently registered a transfer of lot 1690 into his name. Further difficulties followed when Kembangan and Madai came to know of this and the subsequent negotiations did not provide a satisfactory conclusion. Kembangan and Madai say that they are now in a position to redeem the loan and the particulars of Woon's breach of agreement, breach of trust, fraud and deceit are all spelt out in great detail. Furthermore it is also averred that Woon as Solicitor to Kembangan and Madai, had a fiduciary relationship with them but that he abused his position as a Solicitor in obtaining an unfair and unconscionable advantage over them and that the transfers to him should be set aside on that account alone. Allegations are also made against Woon for contraventions against the Money Lenders Ordinance. In a nutshell the prayers against Woon are that the loan transactions with him are unlawful, that the transfers of the lands into his name are null and void, that the consent judgment dated 24 April 1982 should be rescinded and vacated and that all the lands should be re-transferred. In his affidavit, Esa also refers to problems which he had in obtaining full discovery of various documents passing between Madai and Woon which went to establish that the relationship between them was only that of borrower and lender. Esa is at pains to point out that in the present Civil Suit No. 546 of 1984, he is out to protect only his personal interests. The issues raised in the present action, he claims, are distinct from those in the other proceedings.

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Most importantly he emphasizes that apart from relying upon non-disclosure as a ground for setting aside the injunction, Woon has not answered all the various other allegations against him.

This is an appropriate time to consider the relevant legal principles applicable in the dissolution of an injunction for the non-disclosure of facts, which may or may not be material and even where they are material, some facts may be far more material than the others.

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I have already stated that I do not think that *M.R.K. Nayyar v. Ponnusamy & Ors.* lays down an inflexible rule that every time there is non-disclosure of the entire history of a dispute, it must follow as a matter of course, that the injunction obtained should be set aside.

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The grant of an injunction is the subject of a discretion which must of course be judicially exercised in all the circumstances of the case. Suppression and/or concealment are pejorative words, which import a culpable intent, to mislead the Court. It would be futile to attempt to provide a comprehensive definition here of what such an intent would cover. At one end of the spectrum, must be a situation where an objective appraisal of facts not disclosed, would have resulted in the injunction not being granted at all. Towards the other end of the spectrum must be the situation where, there is a subjective apprehension on the part of the applicant, that if the entire history of the dispute is laid out on the Bar Table, the injunction might not be so readily available. The dilemma between brevity and prolixity is always a perennial problem in advocacy.

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Of course it is no excuse for a party to say that he did not appreciate the importance of the facts which were not disclosed but mere ignorance or an error of judgment is not equivalent to concealment so as to amount to improper conduct.

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But at the end of the day it needs to be firmly reiterated that if the grant of an injunction rests upon the exercise of a judicial discretion, so also does its dissolution. Whether the misrepresentation or suppression was calculated to present to the Court a case which was likely to lead to the granting of the injunction, but which in reality was very different from

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a the case presented, is of course a very material consideration but one needs to remember that even where an *ex parte* injunction has been dissolved on the ground of concealment of facts, the plaintiff is not precluded from making another application on merits: See *Fitch v. Rochfort* [1849] 80 LJ Ch 458.

b In applying these principles to the facts before me, I feel compelled to highlight the following features. Very serious allegations have been made against Woon in the pleadings which are now before this Court. Looked at in isolation, it is true that he had not joined issue with the allegations Esa has made against him in the present case but relies solely on the non-disclosure for setting aside the *ex parte* injunction. It is a rule of evidence that when contentious allegations are made in the affidavit of one party which is not denied in the affidavit of the other, then it must be implied that those allegations are admitted if it is reasonable in the circumstances to hold that such accusations should be traversed. In fairness to Woon, I have taken the liberty of examining the Court file in Civil Suit 605 of 1984. There

c Woon has denied that he acted as the Legal Advisor of Madai and Kembangan, and has set out his defence in some detail. He has alleged fraud on the part of the Managing Director of Madai and Kembangan. He has made a counterclaim for specific performance.

d No doubt, if his defence is upheld, Woon should survive the baptism of fire which is now being fueled by the accusations and counter-accusations contained in the cause papers pending in this Court.

e As I said at the outset, the first defendant is an Advocate and Solicitor and an officer of this Court. Where the conduct of such a person is impugned in the manner in which it has been done in this action, it is imperative in the interests of the administration of justice that there be a full inquiry into the charges made and the issues of the liability arising therefrom.

This action and Civil Suit 605 of 1984 both have common questions of law and fact and again in the interest of justice, I now direct that the action should be heard one immediately after the other unless consolidation is applied for and ordered.

f The *ex parte* injunction granted will not be set aside because all the lands concerned are registered in the name of Woon and he cannot therefore suffer any serious prejudice by the preservation of the *status quo*. Esa on the other hand runs the risk of being deprived of the subject matter of the action if the *ex parte* injunction is not maintained.

g If it is to be implied from Woon's affidavit in the application before me that had Esa disclosed all the facts now present, I would not have made the injunction then I would state quite categorically here that those facts would clearly have reinforced my thinking that the injunction was a proper order to make.

But being fully apprised of the situations, it is my view also, that there should be an early trial of this action and Civil Suit 605 of 1984 and I accordingly do so order.

h Understandably Madai has not made any application in the present action with regard to the subsistence of the injunction obtained by Esa. Woon alone made such an application in his Summons-in-Chambers together with a prayer for damages and costs. But in the light of my findings I hold that Woon's application be dismissed with costs to be taxed and paid by him to Esa in any event. As Madai was totally passive in the present application I do not make any order for costs in their favour.

Also found at [1985] 2 CLJ 382

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